

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT L. CONLEY
Claimant

VS.

LOVE BOX CO., LLC¹
Self-Insured Respondent

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Docket No. 1,057,570

ORDER

Respondent requests review of the June 25, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark. Claimant appeared through his attorney James B. Zongker, of Wichita, Kansas. Respondent appeared through its attorney William L. Townsley, III of Wichita, Kansas.

RECORD

The Board has considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held on October 11, 2011, with exhibits, the Evidentiary Deposition of Rod Tormey, taken on October 17, 2011, the Evidentiary Deposition of Carl Freeman, taken on October 17, 2011, the Evidentiary Deposition of Bryan Moore, taken on October 17, 2011, the Evidentiary Deposition of Robert Conley, taken on October 17, 2011, the Evidentiary Deposition of Carl Freeman, taken on June 22, 2012, with exhibits, the deposition of Robert L. Conley, taken on June 22, 2012, and the transcript of Motion Hearing held on June 19, 2012, with exhibits.

ISSUES

The Administrative Law Judge (ALJ) denied respondent's motion to terminate temporary total disability payments, finding that the disputed issue of claimant's termination could be relitigated at the time of final award as the issue had already been decided at the October 2011 preliminary hearing.

¹ Respondent also operates in Wichita, Kansas as Pratt Industries.

Respondent argues that the ALJ erred or exceeded his jurisdiction in determining the justification for claimant's termination based upon the evidence submitted. Respondent argues that the ALJ's Order should be reversed and claimant denied temporary total disability benefits as it has been established that claimant was terminated for cause, and if not for that termination respondent would have continued to accommodate claimant's restrictions as it had been doing at the time of claimant's termination. Respondent further argues that the ALJ failed to consider the additional evidence presented on respondent's Motion to Discontinue Benefits, thus denying respondent its due process rights under K.S.A. 2011 Supp. 44-534a.

Claimant argues that the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes respondent's appeal of the preliminary hearing Order should be reversed and remanded.

Claimant worked for respondent, Love Box Co., LLC, now Pratt Industries for 24 years. His job was to operate a machine which loaded 1 to 2 ton paper rolls. Claimant was to make sure that the rolls were properly on the machine. Sometimes claimant would have to push the rolls into the proper position.

Claimant first started to notice problems with his left leg, which turned out to be his sciatic nerve, in 2010. Claimant also thought that he suffered an injury to his left leg on May 26, 2011. But, he later discovered that he had a bulging disc in his back. Claimant acknowledges that he suffered from prior sciatic nerve problems. However, in the past those problems usually resolved after a few days. Claimant didn't file a workers compensation claim at the time of the May 26 incident. He sought medical treatment with Rick W. Friesen, M.D.

By July 5, 2011, claimant could no longer perform his work and informed Tony Hernandez, the second shift supervisor, that he needed to leave work and go to the emergency room. Claimant was only two hours into his shift when, after pushing a paper roll, he experienced pain in his lower back which, he stated, was a 10 out of 10 on the pain scale. Claimant testified that Vince Miller and Carl Freeman told him he should seek medical attention and have it processed through his health insurance carrier Blue Cross.

Carl Freeman, safety and health manager for respondent, testified that he first became aware of claimant's workers compensation claim on July 13, 2011. But, he had been informed on July 5 that claimant left work early to seek medical attention. He was told at that time that the problems were not work-related. On July 13, 2011, after claimant reported the work-related injury, Mr. Freeman gathered as much information as he could about how claimant allegedly hurt his back on July 5. An incident report was filed in order

to start the process. Claimant was accommodated with light duty when he returned to work, in order to avoid further injury.

Claimant's employment was terminated on August 26, 2011, after his third offense in three months involving damage to company equipment. Respondent estimated that the damage losses exceeded \$10,000. The first incident was for the destruction of a panel screen, the second was when claimant drove a transfer cart outside of its railing causing the wiring to become unhooked. There was no property damage with the cart incident. The third incident involved a forklift damaging a sprinkler, spraying water over stacks of paper.

Mr. Freeman testified that every new hire attends a 4 to 5 hour safety and health training session in which each department reviews its safety procedures. Also, every week there is a seven minute safety training session for each department.²

Mr. Freeman does not believe that claimant's workers compensation claim had anything to do with his termination. Claimant alleges that other employees have caused the same type of damage to company property and were not terminated. Mr. Freeman testified that after claimant was terminated another employee was also terminated for damaging company property. Rod Tormey, a plant scheduler for respondent, testified that terminations are done on a case by case basis. But, if an employee had three serious accidents they would be terminated.

This matter went to preliminary hearing on October 11, 2011, at which time claimant was awarded temporary total disability compensation (TTD) beginning August 26, 2011. Respondent appealed that preliminary order to the Board, alleging that claimant had failed to prove that he suffered an accident, repetitive trauma or resulting injury arising out of and in the course of his employment with respondent. Respondent further disputed claimant's entitlement to TTD, arguing that claimant had been terminated for cause after the above described property damage incidents. A Board Member determined that claimant had satisfied his burden of proving that he suffered personal injury by accident on July 5, 2011. The Board Member went on to determine that the dispute regarding claimant's entitlement to TTD was not an issue over which the Board took jurisdiction on an appeal from a preliminary hearing order.

On June 6, 2012, respondent filed a Motion to Discontinue Benefits alleging that claimant's termination had been for cause and TTD should be discontinued. The matter went to hearing on June 19, 2012, at which time the ALJ determined that the "disputed issue of Claimant's termination was decided on October 20, 2011, as a result of a preliminary hearing." He went on to find that the matter may be re-litigated at the time of the final award. That June 25, 2012, Order was then appealed to the Board.

² Freeman Depo. (June 22, 2012) at 6.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?³

K.S.A. 2011 Supp. 44-510c(b)(2)(C) states:

(C) If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.⁴

Respondent contends that claimant is not entitled to TTD as he was terminated for cause on August 25, 2011. However, the certain defense rule requires that a finding of non-compensability be the result. The "certain defense" issue is subject to review only if the defenses dispute the compensability of the injury.⁵ Here, the certain defense raised by respondent would not result in a denial of compensability, but rather only a denial of TTD. A dispute over a claimant's entitlement to TTD is not an issue over which the Board would normally take jurisdiction on appeal from a preliminary hearing. However, K.S.A.

³ K.S.A. 2011 Supp. 44-534a(a)(2).

⁴ K.S.A. 2011 Supp. 44-510c(b)(2)(c).

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672 at 675, 994 P.2d 641 (1999).

2011 Supp. 44-534a requires, that if there is a disputed issue dealing with the employee's entitlement to medical compensation or temporary total disability compensation or the compensability of the claim, "no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues."

In this instance, the ALJ allowed the record to remain open for the purpose of added testimony and evidence. However, in reading the June 25, 2012 Order of the ALJ, it is not clear that the ALJ actually considered, or even read, the additional evidence presented by the parties. K.S.A. 2011 Supp. 44-551 allows Board review of a preliminary order if it is asserted that the ALJ exceeded his or her jurisdiction in granting or denying the relief requested. The Board has held in the past that an action by an ALJ which constituted a denial of due process, exceeded the ALJ's jurisdiction under K.S.A. 44-551.⁶

"The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."⁷

The revelation of evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason...{an} administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.⁸

For an administrative body to determine the existence or nonexistence of facts, it must first actually review and consider those facts. This record does not indicate that a review of the newly admitted evidence and testimony by the ALJ ever occurred. This failure to review the new evidence constitutes a denial of respondent's due process rights and exceeds the jurisdiction of the ALJ. This matter is remanded to the ALJ for further proceedings consistent with these findings, i.e. a review of the new evidence provided by the parties prior to a determination by the ALJ.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁶ *Graham v. A+ Sweeping, Inc.*, No. 206,881, 1997 WL 378652 (WCAB June 12, 1997).

⁷ *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

⁸ 73 C.J.S. Public Administrative Law and Procedure sec. 59.

⁹ K.S.A. 2011 Supp. 44-534a.

CONCLUSIONS

The failure of the ALJ to consider the evidence presented prior to the issuance of his Order on June 25, 2012, constitutes a denial of respondent's due process rights. This matter is remanded to the ALJ for a determination of the issues presented, after the ALJ conducts a full review of all the evidence presented by the parties.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the respondent's appeal of the preliminary hearing Order of Administrative Law Judge John D. Clark dated June 25, 2012, is reversed and the matter remanded to the ALJ for further proceedings consistent with the above order. The Board does not retain jurisdiction of this matter.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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John D. Clark, Administrative Law Judge